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No. 89-1953

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,
v.
UNITED STATES POSTAL SERVICE,
and
NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONL UNION OF NORTH AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARBITRATION CASES

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Supreme Court of the United States

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ARGUMENT

1. Neither of the respondents has persuasively answered petitioner APWU's showing concerning the scope of Section 301. *See* Petition at 6-14.[1] Several arguments made by respondents, however, require brief correction:

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[1] For example, respondent's argument based upon *Int'l Bhd. of Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), and

First, the Postal Service's argument that "neither collective bargaining agreement expressly *precludes* tripartite arbitration" (Postal Service Br. at 6, emphasis added) is disingenuous, to say the least. The arbitrator's decision (which no party has sought to challenge) held that the APWU's collective bargaining agreement does *not* permit tripartite arbitration.[2] Under well-established principles of Federal labor law, an arbitrator's construction of a collective bargaining agreement, not challenged by any party, is a binding determination of the parties' intent in entering into that agreement, no different from express language in the agreement itself. Thus, no matter how much respondent may try to obscure the fact, the Ninth Circuit's opinion, *does* substitute a court ordered procedure for the one established by the parties themselves, a result entirely inconsistent with the basic premises of Federal labor policy. See Petition at pp. 7-12.

Second, respondents' reliance on the Postal Reorganization Act's authorization of interest arbitration when the parties have reached impasse in negotiations for a new collective bargaining agreement (*see* Postal Service Br. at 10 n.6; Mail Handlers Br. at 16) is entirely irrelevant in the present context, which does not concern such negotiations but rather the resolution of a dispute concerning the parties' contractual rights under an existing collective

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John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (*see* Mail Handlers Br. 13-14), are rebutted in the Petition at 11 n.7 and 18-29, respectively. Similarly, respondents' arguments based upon *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966) (*see* Mail Handlers Br. at 3-4, 14; Postal Service Br. at 9-10), are rebutted in the Petition at 21 n.15, and were rejected by the court below. *See also Louisiana-Pacific Corp. v. Int'l Bhd. of Electrical Workers*, 600 F.2d 219 (9th Cir. 1979).

[2] The arbitrator ruled that the agreement "cannot be interpreted to require the APWU to permit intervention by the Mail Handlers." R.E. 8.

bargaining agreement.[3] Nothing in the PRA sanctions a court-ordered override of an *existing* collective bargaining agreement that is not permissible under the NLRA and Section 301 of the Taft-Hartley Act.

Third, petitioner has shown that Congress knowingly rejected compulsory tripartite arbitration of jurisdictional disputes. The Mail Handlers' contention that Congress' decision has no application where strikes are prohibited (see Mail Handlers Br. at 16 n.21) mischaracterizes the law. The mandatory resolution of jurisdictional disputes by the National Labor Relations Board may be triggered by a threat of economic coercion, conduct far short of a strike.[4] See Petition at pp. 13-14 n.9.

The Postal Service attempts to sidestep this point by contending that while the National Labor Relations Board may not intervene in jurisdictional disputes absent a threat of economic coercion, the courts may use "their authority to interpret and enforce collective agreement to aid in resolving jurisdictional disputes" where such coercion is absent (Postal Service Br. at 11 n.7). This contention misses the point. The courts may "interpret and enforce" labor agreements. Here, however, the Ninth Circuit, by its own admission, was *not* enforcing the parties' intent but decided to compel *non*-contractual tripartite arbitration.

2. Two recent Court of Appeals decisions reveal conflict between the Courts of Appeals as to the propriety of compelling non-contractual tripartite arbitration. *Na-*

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[3] Indeed, respondents' argument proves too much, because it would justify the courts in compelling arbitration of *any* dispute between unions and employers covered by the PRA, regardless of the existence and scope of any contractual arbitration provision.

[4] Moreover, the NLRB's jurisdictional dispute resolution mechanisms are frequently invoked despite the fact that the National Labor Relations Act prohibits strikes over jurisdictional disputes. 29 U.S.C. § 158(b)(4)(D).

tional Post Office Mail Handlers v. American Postal Workers Union, —— F.2d ——, Nos. 89-5272 and 89-5273 (D.C. Cir. July 3, 1990); *United Industrial Workers v. Kroger Co.*, 900 F.2d 944 (6th Cir. 1990).

The Postal Service has acknowledged that the Sixth Circuit in *Kroger* "held that an order for tripartite arbitration was inappropriate because neither of the parties to one of the collective bargaining agreements had filed a formal grievance." Postal Service Br. at 8 n.4. In *Kroger*, one union had filed a grievance and demanded bipartite arbitration, and the employer responded by demanding a tripartite arbitration procedure that would include another union which had not filed a grievance. The Sixth Circuit affirmed the district court's refusal to compel tripartite arbitration. 900 F.2d at 947.

In contrast to the Ninth Circuit's decision in the instant case, which excused the Mail Handlers' failure to file a grievance by concluding that that union's attempted intervention in the APWU's arbitration was "essentially an invocation of its agreement with the [Postal Service]" (Pet. App. 7a), the Sixth Circuit in *Kroger* held that a "mere request to . . . engage in tripartite arbitration . . . does not constitute such a grievance under the collective bargaining agreement," where (as here) the request for tripartite arbitration does not claim a breach of the collective bargaining agreement. *Kroger*, *supra*, 900 F.2d at 947. The *Kroger* court continued, also contrary to the Ninth Circuit, that to hold that the "failure to file a grievance is irrelevant would essentially rewrite the collective bargaining agreement," which the court may not do under federal labor law. *Id.* at 947.[5]

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[5] The Sixth Circuit emphasized the importance of the grievance procedure, relying upon this Court's conclusions that such a procedure " 'is actually a vehicle by which meaning and content are given to the collective bargaining agreement,' " and is " 'a part of the continuous collective bargaining process.' " *Kroger*, *supra*, 900 F.2d

In short, the Sixth Circuit recognized, as the Ninth Circuit did not, that where, as here, there is no dispute between two of the parties, it would be a complete fiction to view the situation as simply consolidating two existing arbitration proceedings (as in *Columbia Broadcasting Systems, Inc. v. American Recording and Broadcasting Ass'n*, 414 F.2d 1326 (2d Cir. 1969)). As the Sixth Circuit stated in *Kroger*, "even under *CBS*, our power does to extend to forcing parties into types of arbitration that contradict their collective bargaining agreement." *Kroger, supra*, 900 F.2d at 948.[6]

The recent decision of the D.C. Circuit in *National Post Office Mail Handlers, supra*, confirms petitioner's reading of the decision below on these points. In the D.C. Circuit, the plaintiff seeking tripartite arbitration was not the employer, but rather the union representing employees who had been assigned to perform the disputed work—the Mail Handlers. Although the Mail Handlers had filed no grievance, the D.C. Circuit observed that under the reasoning of the Ninth Circuit in this case the absence of a dispute between two of the parties is irrelevant. The D.C. Circuit, therefore, held that the APWU was precluded by the Ninth Circuit's decision in this case from challenging the right of the non-grieving union to bring suit under Section 301, stating:

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at 947 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

Although the Sixth Circuit in *Kroger* was not required to reach the question whether the federal courts have the power to compel non-contractual tripartite arbitration where grievances have been filed under both agreements and the party resisting tripartite arbitration has "a duty to engage in separate bipartite arbitration" (*Kroger, supra*, 900 F.2d at 947), that view should be rejected for the reasons stated in the Petition.

[6] This principle applies with particular force where, as here, an arbitrator has already held that only bipartite arbitration is provided by the contract. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

> [F]or us to hold that the Mail Handlers Union may not sue for tripartite arbitration, for want of a cause of action, would squarely conflict with the Ninth Circuit's holding that the separate CBAs between the two unions and the USPS together supply "the requisite contractual nexus . . . [because] all of the parties have agreed to the arbitration of the merits" of their jurisdictional grievances under the Postal Reorganization Act. *Id.* at 1120.

National Post Office Mail Handlers, supra, slip op. at 6.

Thus, the Ninth Circuit's decision in the instant case conflicts with the conclusion of the Sixth Circuit in *Kroger* that a "mere request to . . . engage in tripartite arbitration" where there is no claim of a breach of the collective bargaining agreement between two of the parties (*Kroger, supra*, 900 F.2d at 946-947) is not a sufficient basis for a section 301 action to compel tripartite arbitration. On this fundamental issue of section 301 jurisdiction, then, the decisions in the instant case and *Kroger* conflict. That conflict, and the fact that both the decision below and the decision in *Kroger* depart from the principles of *CBS*, has created confusion between the Courts of Appeals which necessitates clarification by this Court.

3. Respondent Mail Handlers has attempted to diminish the importance of this case by claiming that Petitioner APWU "should be bound by" an arbitration decision issued after the decision of the district court in this case. Mail Handlers Br. at 9-10.[7] Petitioner has two brief answers to that contention. First, that case involved a jurisdictional dispute between two other unions[8] and does *not* bind the APWU. The contention that it "should"

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[7] *United States Postal Service and National Association of Letter Carriers*, No. H4N-45-C-18504 (March 16, 1989).

[8] The National Association of Letter Carriers, AFL-CIO and the National Rural Letter Carriers Association.

bind the APWU was expressly rejected by Arbitrator Linda DeLeone Klein in *United States Postal Service and American Postal Workers Union, AFL-CIO*, No. C7C-4R-C 10827 (October 4, 1989).[9] *Cf.*, *W.R. Grace v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757 (1983).

Second, the fundamental significance of the case at bar results from the confusion among the Circuits over the authority of Federal courts to order extra-contractual tripartite labor arbitration. That point does not turn on the position of these particular parties in this case or hereafter.

4. Finally, the Mail Handlers' speculation regarding the potential for conflicting arbitration awards (Mail Handlers Br. at 16-17) is a red herring. The existence of two bipartite arbitration procedures is not likely to result in conflicting arbitration awards. The second arbitrator will certainly take into account the decision of the first arbitrator in reaching his or her decision. Any cases in which conflicting arbitration decisions are rendered, which are bound to be exceedingly rare, will most likely result from the employer's conduct in granting the same work to two different unions in two different collec-

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[9] The Arbitrator stated:

> The instant case is distinguishable from the one heard by Arbitrator Britton in that his decision involves the NALC and the Rural Carriers and does not address a history such as the 1973 Memorandum between Postal Service, the APWU and the Mail Handlers. Nor does it address any separate agreement such as the 1983 Memorandum between the Postal Service, the APWU and the Mail Handlers to proceed with tripartite arbitration on only two issues. Although Arbitrator Britton reviewed certain aspects of the bargaining history, the fact is that the bargaining relationship between the NALC and Rural Carriers is different than that between the APWU and the Mail Handlers. Also, Arbitrator Britton relied on Article 15.4.A.9., but this section is not included in the Mail Handlers' contract. . . .

tive bargaining agreements. Where the employer has "sold the store twice," it is hardly in a position to argue the inequity of having to pay for its duplicity. *Cf. Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *W.R. Grace, supra*, 461 U.S. 757.[10]

CONCLUSION

For the foregoing reasons, and for the reasons discussed in the Petition, the Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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[10] *See also Kroger, supra*, 900 F.2d at 946 (the mere "possibility of external adverse consequences, such as exposure to inconsistent liabilities, cannot abrogate [the employer's] duty" to engage in bipartite arbitration under the collective bargaining agreement).